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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

HUBERT AGUILAR,

Defendant and Appellant.

B207077

(Los Angeles County
Super. Ct. No. BA302370)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mary H. Strobel, Judge. Affirmed.

Robert M. Sweet, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven E. Mercer and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

Appellant Hubert Aguilar was convicted by a jury of being a felon in possession of a firearm, evading a peace officer in willful disregard of the safety of others and of an assault with a semiautomatic firearm. The jury also found that appellant had committed all three offenses for the benefit of a criminal street gang and that appellant had been armed with a firearm while committing the offense of evading a peace officer. Contrary to appellant's denials, the jury found that he had been convicted of five prior serious or violent felonies.

The trial court sentenced appellant to a third strike term of 25 years to life for evading a peace officer in willful disregard of the safety of others. The gang and firearm enhancements for this offense added 14 years to this term. A concurrent sentence of lesser length was imposed for the conviction of an assault with a semiautomatic firearm. The sentence for the conviction of being a felon with a firearm, also of lesser length, was stayed pursuant to Penal Code section 654. The court imposed various fines and awarded 1,017 days of presentence credit.

We find no error and affirm the conviction.

FACTS

1. The Physical Setting; the Temple Street Gang

The Temple Street gang, in whose territory appellant committed the three crimes of which he stands convicted, is an older Hispanic criminal street gang with roughly 500 members. The territory of this gang is bordered by Sunset, Alvarado and Hoover Boulevards. Benton Way, the actual scene of the crimes, is in this territory. The Temple Street gang is bordered on all sides by other, hostile criminal street gangs.

The primary activities of the Temple Street gang include murder, shootings and robberies.

Evidence of two predicate crimes was received. They were assault with a deadly weapon and possession of methamphetamine for sale, coupled with illegal possession of a firearm.

Respondent concedes that "it was unclear whether appellant was a member of the Temple Street gang." Aside from the facts underlying this appeal, evidence linking

appellant to this gang was that he has been stopped by the police on Temple Street territory, he was found to be at the residence of an older Temple Street gang member and parolee and he acknowledged that his brother Jose Aguilar was a member of this gang.

2. Appellant's Crimes

Uniformed Los Angeles Police Officers Skett and Barron were patrolling in the vicinity of Benton Way in a marked police vehicle at around 3:00 a.m. on May 6, 2006, when Skett heard three gunshots. The officers stopped to listen; within a few seconds, a white Camry appeared, proceeding on Benton Way. The Camry was closely followed by a black BMW at a distance of about 40 yards. The Camry turned onto Sunset and the BMW followed, running a red light in the process. Both cars were making turns at roughly 30 to 40 miles an hour.

The BMW came within 10 to 20 feet of the police car. Skett flashed the police lights onto the BMW, which was also lit by street lights. Skett could see that appellant was driving the BMW and Rodolfo Sermenio, a Temple Street gang member, was hanging out the passenger side of the BMW with a rifle. Appellant and Sermenio were visibly shocked when they saw the police car.

With Skett driving, the police car with lights and siren on began a pursuit of the BMW as it accelerated up to 90 miles per hour on Sunset, and as the BMW turned into smaller streets off Sunset. Appellant turned off the BMW's lights, ran a red light and managed to shake Skett's pursuit.

Other police cars had taken up the chase. Appellant was arrested at around 3:40 a.m. near Alvarado. Appellant was on foot, running and sweating; he had abandoned the BMW. Skett identified appellant at the scene of the arrest as the driver of the BMW. Sermenio was also arrested and Skett identified him on the scene as the passenger of the BMW with the gun. Finally, the BMW was found, with the hood warm to the touch. A sawed-off .22 rifle was found near the BMW. The gun smelled as if it had been recently fired.

As far as the BMW was concerned, it was owned by appellant's mother who had given him permission to drive the car. Appellant's and Sermenio's fingerprints were found on the car; there were no recoverable prints on the gun.

3. Evidence Supporting the Gang Enhancements

The prosecution called Officer Frank Garcia, assigned to the Rampart division, with several years of experience working in the gang detail. According to Garcia, "the possession of a gun itself is what gang members use to show [*sic*] fear and intimidation within the community." Guns are tools that the gang uses to intimidate people in the community. Intimidation benefits a gang because people will fail to report crimes. Shooting at an occupied vehicle benefited the gang because it showed that the Temple Street gang was ready to protect its territory. This elevates the status not only of the shooter and the person assisting the shooter, it also elevates the gang's status as an organization that is capable of defending its territory. According to Garcia, the shooting at the Camry occurred in the stronghold of the Temple Street gang. Garcia testified that the shooter in the BMW, Sermenio, was trying to protect the territory of the Temple Street gang.

Evading the police benefits the gang in that it demonstrates that the gang is able to show disrespect for the police. A successful escape enhances the reputation and status of the gang member who escapes and increases that person's, and the gang's, notoriety and power. The very brazenness of the shooting in this case makes it easier to commit crimes in the future. The fact that appellant acted as the driver of the BMW during the shooting shows that appellant was associating with Temple Street gang members.

4. Defense Evidence

The evidence of the sighting of the BMW together with Sermenio armed with a rifle, the flight of the Camry, the chase and ensuing arrest was uncontradicted.

The defense presented the testimony of an expert about the alleged weakness of identification evidence. The defense also presented evidence about an allegedly false arrest that Skett had made in another case.

DISCUSSION

1. The Trial Court Did Not Abuse Its Discretion in Denying Appellant's Request to Bifurcate the Trial of the Gang Enhancements

Appellant made an in limine motion requesting that the trial court bifurcate the trial of the gang enhancements. He contends on appeal that the trial court abused its discretion in denying this motion.

Appellant begins with *People v. Hernandez* (2004) 33 Cal.4th 1040, 1049, a decision that held that the trial court has discretion to bifurcate the trial of gang enhancements and which also warned that there are cases when “gang evidence, even as it relates to the defendant, may be so extraordinarily prejudicial, and of so little relevance to guilt, that it threatens to sway the jury to convict regardless of the defendant’s actual guilt.”

Although the trial court was at first inclined to grant the motion, in the end the court agreed with the prosecutor that gang evidence in this case was relevant to show motive and identity. The court reached this conclusion after it had read the transcript of the preliminary hearing.

Whether the trial of the gang enhancements should be bifurcated was consigned to the discretion of the trial court. (*People v. Hernandez, supra*, 33 Cal.4th at p. 1048.) The question in this court is whether the trial court abused its discretion. (*Ibid.*)

Judicial discretion has been described as “the sound judgment of the court, to be exercised according to the rules of law.” (*Lent v. Tilson* (1887) 72 Cal. 404, 422.) This means that the court must act within applicable legal principles (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 393), i.e., the court cannot act arbitrarily, capriciously or with “whimsical thinking.” (*In re Cortez* (1971) 6 Cal.3d 78, 85.) An abuse of discretion occurs when the trial court’s decision exceeds the bounds of reason (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566) or, as it has been put sometimes, an action that ““transgresses the confines of the applicable principles of law”” is outside the scope of discretion and is therefore an abuse of discretion. (*Horsford v. Board of Trustees of California State University, supra*, 132 Cal.App.4th 359, 393.)

Measured against this standard, the court's decision was not an abuse of discretion. Appellant was convicted of being a felon in possession of a firearm, evading a peace officer in willful disregard of the safety of others and of an assault with a semiautomatic firearm. The factual scenario behind these convictions was a wild ride and flight, with shots fired from the BMW, through the streets of Los Angeles in the small hours of the night. This behavior was so bizarre that motive was an issue in this case. As the trial court stated in denying the motion for a new trial, the request to bifurcate was denied because the gang enhancement evidence showed motive, as well as intent when it came to the charge of aiding and abetting the assault with a semiautomatic weapon.

It cannot be said that the evidence supporting the gang enhancement was, in and of itself, unduly prejudicial. In the final analysis, Garcia's testimony about gangs was nothing but common sense and squared with a lay person's general understanding of gang behavior.

In sum, the trial court was empowered to admit evidence that showed motive and intent. The evidence that was admitted was relevant and did serve to show motive and intent. Thus, the trial court acted well within the bounds of discretion in refusing the request to bifurcate trial of the gang enhancements. It is also true that the management of a trial, including the decision not to bifurcate, is a matter that is best left in the hands of the trial court. This only underlines that we should accord this decision deferential review. (*Hurtado v. Statewide Home Loan Co.* (1985) 167 Cal.App.3d 1019, 1025, disapproved on other grounds in *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 479, fn. 4.)

We do not agree with appellant that the evidence on the gang enhancements was a covert way of introducing inadmissible testimony by Sermenio, which had been given during the preliminary hearing. Garcia's testimony about gangs did not rely on Sermenio's testimony; Garcia's conclusions and reasons were his own.

2. There Is Substantial Evidence That Appellant's Crimes Were Committed with Intent to Benefit a Criminal Street Gang

Appellant contends that there was insufficient evidence that he was a member of the Temple Street gang.

Appellant was driving the BMW, following the Camry, while Sermenio was hanging out the window, shooting at the Camry and the people inside that car. Once the police appeared on the scene, appellant drove through the streets at high speeds, successfully evading the officers. Given these rather dramatic circumstances, and the explanation that Garcia offered for them, it is evident that appellant had a central role in committing crimes that benefited the Temple Street gang. As the dispositive evidence is uncontradicted, it is hard to see how one could come to any other conclusion.

That it is not clear whether appellant was a member of the Temple Street gang does not detract from the fact that he was critical to the commission of several gang-on-gang felonies and to the escape from the police. The question is whether the evidence is sufficient to show that these crimes were for the benefit of a criminal street gang. We think that this is not even a close question; it is uncontradicted that these crimes were committed for the benefit of the Temple Street gang. Appellant need not have been a member of the Temple Street gang in order to commit crimes that benefited that gang. (*People v. Bragg* (2008) 161 Cal.App.4th 1385, 1402.)

Appellant contends that because the jury found him not guilty of the charge of shooting at an occupied vehicle, the jury effectively exonerated him from committing a crime to benefit the Temple Street gang. But the jury found appellant guilty of an assault with a semiautomatic weapon, which means that the jury did conclude that appellant aided and abetted Sermenio in shooting at the Camry.

The evidence was sufficient to sustain the jury's findings on the gang enhancements.

3. *There Was No Error Under Wheeler*¹ and *Batson v. Kentucky*²

Appellant contends that the prosecutor improperly exercised two peremptory challenges. The record does not bear this out.

Juror No. 20, a student who worked at a gas compression company, stated that a female cousin was in the Hoover gang; that a male cousin had been stabbed by a gang member three years earlier; that she was harassed by the police for no reason; and that it was not fair to be asked to deliberate about guilt or innocence without also thinking about the punishment for the offense.

Juror No. 34, a clerk for the Teamsters Union, knew several people in law enforcement but also know numerous people who were in prison for drug offenses, embezzlement, forgery and drunk driving; most of her daughter's friends were in gangs; and she stated that she never believed a police officer's first story and always second-guessed the police.

The defense made its *Wheeler* motion after Juror No. 34, the second African-American to be challenged by the prosecution, was excused. The court asked the prosecutor to state the reasons for challenging Jurors No. 20 and No. 34.

As to Juror No. 20, the prosecutor stated that Juror No. 20 was unduly concerned about punishment and she had a cousin who was a gang member. And, according to the prosecutor, Juror No. 34 always second-guessed the police and knew a number of people imprisoned for various serious offenses.

We think it is patent that neither of these prospective jurors should have served on this jury. In the instance of Juror No. 34, her candid admission that she never believed the police disqualified her from serving on this case. Juror No. 20 stated that she had been harassed by the police for no reason. A negative experience with law enforcement is a valid reason for a peremptory challenge. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1125.) The trial court's ruling denying the *Wheeler* motions is supported by

¹ *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

² *Batson v. Kentucky* (1986) 476 U.S. 79.

substantial evidence. (*People v. Avila* (2006) 38 Cal.4th 491, 541.) We therefore decline to set those rulings aside. (*Ibid.*)

DISPOSITION

The judgment is affirmed.

FLIER, J.

We concur:

RUBIN, Acting P. J.

BIGELOW, J.